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No. 90-675

In The

Supreme Court of the United States

October Term, 1990

CINEMA BLUE OF CHARLOTTE, INC., a North Carolina Corporation, aka CINEMA BLUE ADULT ENTERTAINMENT CENTER, aka CINEMA BLUE OF CHARLOTTE, aka CINEMA BLUE, JIM ST. JOHN AND CURTIS RENE PETERSON,

Petitioners,

vs.

STATE OF NORTH CAROLINA,

Respondent.

Petition For A Writ Of Certiorari To The North Carolina Court Of Appeals

BRIEF IN OPPOSITION

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Petitioners,

vs.

STATE OF NORTH CAROLINA,

Respondent.

Petition For A Writ Of Certiorari To The North Carolina Court Of Appeals

BRIEF IN OPPOSITION

Respondent opposes this petition for the reasons which follow.

SUPPLEMENTAL STATEMENT OF FACTS

Petitioners are prisoners of the State of North Carolina, having been convicted of three felonies at the February 13, 1989 Criminal Session of Superior Court for Mecklenburg County, Honorable Marvin K. Gray, Judge Presiding. St. John was convicted of conspiracy in case 88 CRS 65318, accessory before the fact in case 88 CRS 65320, and accessory before the fact in case 88 CRS 65324. All involved the dissemination of two items of obscene materials, video tapes with short titles of "Video Games X," and "Revue", with each conviction resulting in two year sentences, running consecutively. Peterson was convicted of the same offenses in cases 88 CRS 69853, 88 CRS 62474 and 88 CRS 62478 and also received three consecutive two-year sentences. The corporation, Cinema Blue, was convicted of conspiracy in case 88 CRS 69859, and two counts of dissemination of obscenity in cases 88 CRS 46966 and 88 CRS 46976 and as a result was fined $150,000.00. The petitioners appealed their convictions to the North Carolina Court of Appeals which affirmed in an opinion filed June 5, 1990 and reported at 98 N.C. App. 628, 392 S.E.2d 136. The North Carolina Supreme Court denied further review by order of July 26, 1990, 327 N.C. 142, 394 S.E.2d 181. Petitioners St. John and Peterson currently have an application for writ of habeas corpus pending in the Western District of North Carolina, C-C-90-286-P, raising several issues which appear in this petition, while the corporation has a companion 1983 action pending there under the same case number.

In petitioners' prosecutions, the state's case was based on the items at issue themselves, testimony about the nature and appearance of Cinema Blue's business,

and testimony about the petitioners St. John and Peterson's contacts with the business and store. Certain evidence they offered, loosely characterized as expert, was not admitted and the crux of this petition is whether it was properly excluded consistent with the First Amendment. The items involved and respondents' critique of them from petitioners' pending habeas corpus action is as follows:

> *Film Evaluation Project Questionnaire* (Petition App. D, pp. 17-86)
>
> Tables 4 and 4A of this item (App. 46-54) are an attempt to show community standards with relation to the films at issue by virtue of their impact on 20 to 24 people who were more liberal than the Mecklenburg County Community as a whole. The questionnaire showed that either 61% or 52% thought that adult movies were "tolerated" in the community.
>
> Tables 6 and 6A (App. 57-60) continued this trend. They showed that upon being quizzed before and after being shown five movies, the affirmative opinion on the three questions asked went up after some, down after others and stayed the same after one. At least one of the results made little sense – after seeing one movie, "Control", fewer people said they should be allowed to see it, but fewer people also thought it was unhealthy, shameful or morbid.
>
> The methodology used for inquiries seems flawed in that three questions were asked for most of the questionnaire – do you think adult films are tolerated; do you think you should be able to see them; and do you think that showing adult material appeals to a unhealthy, shameful or morbid sexual interest. The first question references the average adult in the community and registers about a half and half response. The

second deals with the interviewee and registers a three-fourths percent response in favor of latitude. The third references neither of the above, leaving the interviewee to divine whether he is being asked about himself or the community, with response to this question being approximately 50-50 as well. The last two questions also deal with the individuals, not the community; while the first deals with tolerance, not standards.

Tables 7 and 8 (App. 61-70) changed the questions. On Tables 7 and 7A, the first question asked if the interviewee's neighbor checked out the films, would there be "something wrong" with him; the second asked should the neighbor, and the interviewee, be able to check out such films; the third asked if the movies were what the interviewee expected "given this definition of x-rated videos, adult movies and magazines"; the fourth asked would it appeal to the neighbor's unhealthy, shameful and morbid interest in sex; while the fifth asked if a medical professional could use the films in marital therapy. The first and fourth seem fairly remote at best, and may well zero in on the interviewee's opinion of his neighbor, often a friend or enemy, instead of focusing on the act involved; the second runs afoul of the "personal rights" bias; the third is wholly unclear; and both films at issue here flunked the fifth. Tables 8 and 8A only throw in a few additional topics such as gun control, those with religious beliefs dictating what others should read; and the number of similar videos viewed before.

Community Standards Survey (Petition App. 74-86)

This item has 32 questions dealing with spousal and date rape, personal data of the interviewees, a Mecklenburg County religious organization, subscriptions to books and cable

TV, rock music, and the political/religious characteristics of the interviewees. Sandwiched in are five questions about adult movies, the responses to which showed that less than 50% of those interviewed believed they were tolerated, although they also showed a high score on the interviewees' beliefs in their personal right to see these items. Since this was a telephone survey, the interviewees did not see the items at issue in this case.

Telephone Survey of Cinema Blue Customers (Not included in Petition Appendix).

This was a survey of 200 persons done on the eve of trial. It was virtually an all-male survey, the results of which could not be used to generalize to the population as a whole according to petitioner's own witnesses. Instead, they claimed only that it was "one more indicator" of the way things were in Mecklenburg County.

Three Supposedly Comparable Videos (Not developed in Petition Appendix).

These were submitted as comparable items which were claimed not to be obscene, evidently because no prosecution had been based on them. Their relationship to showing contemporary community standards was that they, and others of which they were representative, had been rented from Cinema Blue by about 1.2% of the population in Mecklenburg County (approximately 5,700 rentals from 500,000 people, duplicative renters unknown) in a 7-month period.

From the above, it can be seen that respondents' view of this case as a whole is that petitioner was prevented from putting before the jury technical evidence given to the state late in the game that showed (1) that 40-60% of 20 to 24 citizens willing to watch adult films felt they were tolerated; (2) less than half of the interviewees in a wider

survey thought, speaking hypothetically rather than with regard to the particular items involved in this case, that adult films were tolerated; and, (3) some of the male patrons of Cinema Blue also thought so.

REASONS THE WRIT SHOULD NOT ISSUE

I.

CERTIORARI SHOULD NOT ISSUE TO REVIEW PETITIONER'S FIRST COMPLAINT. THE OPINION EVIDENCE AND SURVEY WERE PERMISSIBLY EXCLUDED UNDER THE DECISIONS OF THIS COURT, DUE PRIMARILY TO THE TENUOUS PROBATIVE VALUE INHERENT IN THE EVIDENCE, AND SECONDARILY TO ITS NEUTRAL-TO-NEGATIVE RESULTS IN THIS PARTICULAR CASE.

Petitioners first argue certiorari should issue to correct the trial court's exclusion of testimony by their experts on contemporary community standards. They assert this was a denial of their right to present a defense, was against the indications of six cases from this court, and was in conflict with other state court decisions.

As noted before, the expert evidence here has been set out in the Petition at pp. 17-113. It consisted of three items – a film evaluation questionnaire, a telephonic community survey, and a telephonic survey of Cinema Blue patrons. The evidence was excluded by Judge Gray as too likely to confuse the jury. As the prior critique of the evidence indicates, this was correct. Therefore it is plain that neither petitioners' claim of error nor of at least certworthiness, is correct.

First, the exclusion of the evidence did not deprive petitioners of their only chance for acquittal as without it they prevailed in two companion cases. In addition, as previously pointed out with regard to the two telephone surveys, the results of the citizenry as a whole were neutral to negative, and were obtained without the person seeing the materials involved in this case. Additionally, the telephone survey of Cinema Blue customers comes close to being a joke in the sense of providing expert evidence, even putting it aside the admitted fact that its results did not generalize to the population as a whole. Finally, even the film evaluation project results were essentially neutral, showing roughly equal views among the participants, with the questions involving the films seeming in many cases to be loaded, remote or irrelevant.

Second, the law on this type of evidence as a matter of constitutional law is fairly clear and this is shown by the six or seven cases from this court that petitioner references. From them, it can be gleaned that this type of evidence is sometimes viewed as being a good bit less than it is offered as, such as in *Kaplan* and *Smith.* Nevertheless, it is admissible under *Miller,* in that the constitution does not preclude its use; and apparently it is often used in California, as 5 of Petitioners' 7 cases from this court having arisen there. Otherwise however, the relevance and admissibility of evidence is usually a matter of state evidentiary law, *Lisenba v. California,* 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed. 166 (1941), *United States v. Dowling,* ___ U.S. ___, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990); although on occasion, state evidence rules must yield, such as in the situations presented in *Davis v. Alaska,* 415 U.S. 308,

94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) and *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1058, 35 L.Ed.2d 297 (1973). That this is not such a case, however, is shown by the low probative value of the evidence, along with its questionable quality. Given this, it remained the state's prerogative to exclude it as a matter of law, which it did not, or to exclude it in the trial judge's discretion, which it did. This is a standard evidentiary situation, not a constitutionally significant one, and the evidence involved here does not change this.

The supposed conflict in the case of cases petitioners mention on pages 13 and 14 of his Petition is largely illusory. What often appears is different decisions within a state due to differing fact situations. Examples of this are Massachusetts where *United Box* admits the evidence and *Mascolo* does not; Indiana where *Saliba* admits the evidence and *Sedelbauer* and *Richards* do not; and North Carolina where *Mayes* admits the evidence but *Anderson* and the present case do not. Additionally, putting this point aside, examination of the cases individually does not show a substantial conflict. *Nelson, Assaf* and *Strope* deal with state statutory law, not the federal constitutional principles at issue here; while *Carlock* expressly reserves decision on the primary argument here – the generality of the evidence. *United Box* deals with expertise on literary value, not community standards. *Sedelbauer, Flynt, Mascolo, Mayes,* and *Anderson* exclude this evidence on routine, non-constitutional evidentiary points such as lack of witness qualification or remoteness of the survey questions involved to the issue. *Richards,* which upholds exclusion, and *Barton,* which does not, did not describe the evidence with which they deal. The sum

of this is that where the evidence has been shown to be reasonably relevant to the issue of obscenity as opposed to only checking on general attitudes which are related but removed from the actual issue, the evidence has usually come in. For the reasons previously noted, the evidence here was wide of the mark, as well as being neutral-to-negative.

II.

CERTIORARI SHOULD NOT ISSUE TO REVIEW PETITIONERS' SECOND COMPLAINT. THE COMPARISON EVIDENCE OFFERED TO SHOW CONTEMPORARY COMMUNITY STANDARDS HAD ONLY A 1.2% DEMONSTRABLE ACCEPTANCE AND WAS LIMITED TO THE PETITIONERS' STORES OR CUSTOMERS.

Petitioner next argues that certiorari should be granted to clarify the foundation for admitting of comparative evidence and to discuss the Second Circuit's *Womack* prerequisite of a reasonable degree of community acceptance, urging that the degree of acceptance here would have satisfied the courts in the *Flynt* and *Saliba* cases, thereby creating a conflict to be settled.

The comparison evidence offered here was three videos which were described as representative of petitioner's inventory and, in turn, had been rented 5,700 times by the 500,000 citizens of Mecklenburg County in the preceding 7 months. If it is assumed that each rental was by a different individual, this approximated 1.2% of the population, meaning that petitioner contends that 1.2% of the population is a reasonable degree of community acceptance. It is inconceivable that this could be so

described, considering the evidence is offered as an indication of contemporary community standards. Such standards simply are not set by 1.2% acceptance. Therefore Judge Gray properly kept the jury from the burden of having to divert its attention from the probative evidence to this. The *Flynt* and *Saliba* cases do not seem at odds with this, although petitioner asserts there may be a conflict. In contrast to the single store's customers dealt with in this case, the evidence in *Saliba* (the volume of which was not stated) apparently dealt with magazine distribution to a number of outlets for general interest publications, such as newsstands and bookstores; while *Flynt* definitely did deal with this, the evidence there involving distribution to 324 outlets in Atlanta. Parenthetically, in neither of those cases was the evidence admitted either.

III.

CERTIORARI SHOULD NOT ISSUE ON PETITIONERS' THIRD COMPLAINT. THE EVIDENCE AMPLY SUPPORTED A FINDING OF KNOWLEDGE, AND THE ARGUMENT PETITIONERS MAKE RESURECTS THOSE PREVIOUSLY REJECTED BY THIS COURT.

Petitioners next argue certiorari should issue to correct the trial court's failure to require a finding of *scienter* in the sense of direct evidence of knowledge of both the actual contents of the specific items on which their prosecution was based, and the fact the items were legally obscene. Instead, the state relied on circumstantial evidence, which was substantial in volume, while Judge Gray's instructions required knowledge of the "nature" of the materials. However, petitioner alleges this was in

conflict with the decisions of this court and therefore constitutes a basis for certiorari.

The state's evidence showed the non-corporate petitioners visited Cinema Blue on several occasions and therefore were familiar with the materials in the store. The store was in the business of selling sexually explicit materials; the items at issue in this case were representative of the store's inventory as a whole; the few non-adult items in the store were obviously only for show (e.g., a few out-of-date general circulation magazines; a general audience film which was untitled and never changed); and the investigating officer even got propositioned there.

Applying the law to these facts, the use of the evidence above was in line, not in conflict, with the decisions of this court. It tended to show petitioners were "in some manner aware of the character" of the videos at issue. This was all that was required by *Hamling v. United States*, 418 U.S. 87, 119-124, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974); and it provided strong circumstantial evidence of *scienter*. Proof in this fashion is expressly permitted in obscenity cases by *Smith v. California*, 361 U.S. 147, 154, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959).

This conclusion is unaffected by petitioners' claim that since the material was presumptively protected, this was a bar to inferring *scienter*. The same argument was rejected in *Hamling*, and as early as *Rosen v. United States*, 161 U.S. 29, 16 S.Ct. 434, 40 L.Ed. 606 (1896). *Scienter* relates to factual knowledge about the group of materials involved, not the ins and outs of obscenity law; and this calls to mind the old proverb that ignorance of the law is

no excuse. Petitioners' argument also recalls the warning of Mr. Justice Frankfurter concurring in *Smith* that the knowledge requirement cannot be of such a nature as to nullify, for all practical purposes, the power of the state to prosecute. To accept petitioners' argument would do just that by permitting enforcement of the law only when (1) a person was seen viewing certain materials, and (2) the particular materials were then adjudicated obscene. This would require a permanent in-house stake out.

IV.

CERTIORARI SHOULD NOT ISSUE ON PETITIONERS' FOURTH COMPLAINT. IT IS IN PART BASED ON AN INTERPRETATION OF STATE LAW, AND OTHERWISE SEEKS TO DECRIMINALIZE CERTAIN OBSCENITY BY LIMITING THE RELEVENT COMMUNITY STANDARDS TO THOSE OF THE GROUP THAT ESPECIALLY ENJOYS THE PARTICULAR MATERIAL. PUT ANOTHER WAY, IT SEEKS TO EXEMPT PORNOGRAPHY FOR SEXUAL DEVIANT GROUPS FROM THE OBSCENITY LAWS AND THEREBY GIVES THESE GROUPS SPECIAL FAVORABLE TREATMENT UNDER THE CRIMINAL LAW.

Petitioner next argues that certiorari should issue to limit prosecutions for deviant group materials unless members of the deviant group, rather than average persons, apply their contemporary standards in determining whether the material involved is obscene. Here one of the films – "Video Games X" – was gay porn, and a homosexual from Mecklenburg County testified that the film would not be patently offensive to that group. Judge Gray, however, had the jury decide offensiveness on the basis of general community standards.

Petitioner relies on the *Mishkin* case and on N.C.G.S. § 14-190.1(d) dealing with "children and especially susceptible audiences" to support his argument that the law was not followed and this Court should therefore intervene. The state statute does not seem to be applicable here as homosexuals are not especially susceptible persons in the sense that children are, although certainly they may be a singular target group for certain materials. However, even if respondents are incorrect in this view, the Court does not normally invest its time in the construction of state statutes nor rest its decision on them and there is no good reason to do so here. Turning to *Mishkin*, both it and *Hamling*, in reconfirming *Mishkin* at 127-130, operate the opposite way. They make prurient interest provable when the item involved might be said to have no appeal to non-deviant groups or to the public at large, i.e., to the average person in the community. Where the materials are aimed at deviant groups, prurient interest may be judged either with regard to that group's standards or those of the community as a whole. Put differently, *Mishkin* gives the state somewhat more leeway with its evidence in harder cases. That this is so follows from two facts. First, activities which have a purely sexual appeal and are done in a patently offensive way do not necessarily change just because the members of the performing group change. Second, where sexual preference and activity define the deviancy, then virtually nothing realistic can be conceived of which would meet the "patently offensive" standard if the standards are those of the deviant group. The effect of this would be to permit the public dissemination of pornography while at the same time claiming that the public dissemination was

not public at all – an irrational approach, as well as one which decriminalizes obscenity for some groups but not for others.

V.

CERTIORARI SHOULD NOT ISSUE ON PETITIONERS' FIFTH COMPLAINT. IT IS BASED ON A SITUATION WHICH DOES NOT EXIST IN THIS CASE AND ONE THAT IS SO RARE THAT IT IS INCONCEIVABLE THE COURT COULD SPARE ITS TIME FOR IT IN THE ABSENCE OF SOME REAL NECESSITY.

Petitioner next asserts that certiorari should issue to determine if expert testimony is needed to prove obscenity in the case of deviant group materials, a question reserved in the *Paris Theatre's* decision, footnote 6. This is not the case for determination of this matter, nor is a situation likely to occur that needs it.

The footnote reads in relevant part:

> [The use of experts in these cases often makes a mockery of the concept of expert testimony because "hard core pornography . . . can and does speak for itself"] [cite omitted]. We reserve judgment, however, on the extreme case, not presented here, where contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest.

Homosexuality, while often described as deviant, is not so bizarre, i.e., unusual, as to fit this description. The sexual activity associated with it is well-known and the deviancy is viewed as arising more from the fact that the acts occur between persons of the same sex, rather than

from the acts themselves. Given this, the Court's footnote seems inapplicable; and more of a limitation on its own prior language in the case, not a marker for a future constitutional decision by it.

VI.

CERTIORARI SHOULD NOT ISSUE TO RE-EXAMINE THE *MILLER* TEST.

Petitioner finally urges certiorari issue to reconsider the entire area of the obscenity law, particularly the *Miller* test. Respondents oppose this.

In considering whether or not to reexamine the *Miller* standard, it must first be kept in mind that the standard is commended by 17 years history of acceptance and interpretation and such familiarity and ease of application as that brings; as well as being commended by the fact that the standards have been used in various state statutes, including North Carolina's. While the *Miller* test may not have worked perfectly or even as easily as desirable, it has worked. Second, the likelihood of getting a semantically or conceptually easier standard is problematical. In fact, petitioners' prior arguments have contemplated a more intricate, and hence more difficult, approach to the problem. Third, the fact that some lower courts grumble is always going to be the case so long as commercial speech is given First Amendment protection, because the in's and out's of First Amendment applications to commerce are not easy. Finally, the differences in application stemming from use of the *Miller* standards inheres in the facts that separate localities within the nation are allowed

to use them and that this is a diverse country where situations differ from locality to locality. The court has already grappled with this and rejected the concept of some national standard. What petitioner seems to argue for, then, is merely a rehashing of that previously decided point.

CONCLUSION

For the reasons above, respondents urge that the Court not issue a writ of certiorari to review the decision of the North Carolina Court of Appeals on petitioners' appeal, and request this Court to deny petitioners' application for same.

This the 18th day of January, 1991.

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